Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

ESPERANZA RODRIGUEZ DE CASTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had *in rem* jurisdiction in a civil forfeiture action over funds in accounts at financial institutions in London, England, when those funds had been seized by British authorities at the request of the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 63 F.3d 148. The opinion of the district court (Pet. App. 1c-10c) is reported at 856 F. Supp. 759.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1995. A petition for rehearing was denied on October 19, 1995. Pet. App. 1b. The petition for a writ of certiorari was filed on January 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In July 1993, the United States filed an *in rem* action in the United States District Court for the Eastern District of New York seeking civil forfeiture pursuant to 18 U.S.C 981(a)(1)(A) and 21 U.S.C. 881(a)(6) of funds in seven bank accounts at financial institutions in London, England, in the names of petitioner and her late husband. The complaint alleged that the funds in the bank accounts were the proceeds of an extensive international drug-trafficking and money-laundering enterprise operated by the Cali Cartel and headed by petitioner's son-in-law, Jose Santa Cruz Londoño. The district court denied petitioner's motion to dismiss the forfeiture action for lack of *in rem* jurisdiction and later entered an order forfeiting the funds. Pet. App. 1c-10c; Pet. C.A. Br. App. A14-A15. The court of appeals affirmed. Pet. App. 1a-14a.

1. In July 1990, the United States asked British authorities to restrain funds in seven London bank accounts controlled by Londoño in light of the anticipated federal criminal prosecution of Londoño and his associates in the United States. The request was based on a 1988 mutual assistance treaty between the United States and the United Kingdom[1] and the

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[1] Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, Feb. 9, 1988, 1989 WL 428726 (Treaty).

applicable British forfeiture statute.[2] On July 30, 1990, the British authorities obtained an order restraining the bank accounts from the Queen's Bench Division of the High Court of Justice. Pet. App. 3a-4a; Gov't C.A. Br. 10.

In October 1990, a criminal complaint was filed in the United States District Court for the Eastern District of New York charging Londoño and three others with conspiring to distribute cocaine and conspiring to launder drug proceeds. Londoño, however, remained a fugitive, living, it was believed, in Columbia. In 1991, extradition arrangements between the United States and Colombia ended, making it unlikely that Londoño would be tried in this country on the federal charges. Pet. App. 4a, 3c-4c; Gov't C.A. Br. 10.

2. On July 16, 1993, the government filed the civil forfeiture complaint in this case in the Eastern District of New York. On July 19, 1993, pursuant to a magistrate judge's order, the clerk of the court issued an arrest warrant *in rem* commanding the U.S. Marshals Service to attach the funds in the seven bank accounts. At the request of the U.S. Marshals Service, a British constable in London attached the funds on September 8 and 16, 1993, by serving the complaint and warrant on the banks holding the funds. Pet. App. 4a; Gov't C.A. Br. 10-11.

On October 1, 1993, petitioner, a foreign national residing in Colombia, filed a notice of claim to the funds in the seven bank accounts. One month later, she moved to dismiss the forfeiture complaint on the

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[2] Drug Trafficking Offences Act, 1986, ch. 32 (Eng.) (Designated Countries and Territories), reproduced in Pet. C.A. Br. App. A50-A82.

ground that the district court lacked *in rem* jurisdiction over the funds. Petitioner asserted that the district court lacked actual or constructive control over the funds in the London bank accounts because any forfeited funds would be deposited into the general fund of the United Kingdom pursuant to th 1988 treaty and British law. Pet. App. 4a-5a; Gov't C.A. Br. 4.

At the same time, petitioner and her daughter, who was Londoño's former wife, initiated an action in the Crown Office Division of the High Court of Justice in Great Britain to discharge the 1990 restraining order issued by the Queen's Bench Division. They argued, among other things, that the restraining order could not remain in place pending a civil (as distinguished from a criminal) forfeiture proceeding in this country. Pet. App. 5a; Gov't C.A. Br. 4.

The district court deferred ruling on petitioner's motion to dismiss the forfeiture complaint pending resolution of the British action. In the meantime, the court issued a preliminary injunction prohibiting petitioner from transferring the funds, except for the release of $100,000 for petitioner's legal expenses. Pet. App. 5a; Gov't C.A. Br. 4-5.

On March 18, 1994, the British High Court upheld the 1990 restraining order. Pet. App. 5a; Gov't C.A. Br. 5. The High Court concluded that, "although now based on the civil proceedings in New York, the order will remain in force." Pet. App. 4c.

3. The district court denied petitioner's motion to dismiss the forfeiture action for lack of *in rem* jurisdiction. Pet. App. 1c-10c. The court determined that it had subject-matter jurisdiction over the forfeiture action under 28 U.S.C. 1355, and that venue was proper under the same statute. *Id.* at 5c-6c, 9c. It further

ruled that "[i]n rem jurisdiction over property in a foreign country exists if there is a seizure of the property that gives the court constructive control over the property, and if the seizure satisfies the traditional concerns of jurisdiction, namely enforceability of the judgment and reasonable probability of notice to the parties interested in the property." *Id.* at 9c. Applying that test, the court held that the "[s]eizure of the accounts in Great Britain with the assistance of the British government gave [the] court constructive control over the defendant funds." *Ibid.* It also found that the High Court's decision in 1994 continuing the restraining order "gives assurance that a judgment of forfeiture issued by this court would be enforced in England." *Id.* at 9c-10c.

After her motion to dismiss was denied, petitioner failed to answer interrogatories and to produce documents as required by a court order. The government moved for summary judgment on the ground that petitioner was collaterally estopped by a related action from contesting the issues of probable cause and innocent ownership of the funds. Petitioner did not oppose the government's motion. On May 25, 1994, the district court granted summary judgment for the government and ordered forfeiture of the funds under 18 U.S.C 981(a)(1)(A) and 21 U.S.C. 881(a)(6). Pet. App. 5a-6a; Gov't C.A. Br. 5-7.

4. The court of appeals affirmed. Pet. App. 1a-14a. It rejected the government's argument that, as a result of 1992 amendments to 28 U.S.C. 1355, the district court did not need actual or constructive control of the *res* to assert *in rem* jurisdiction. *Id.* at 9a-11a. The court of appeals held, however, that the district court had constructive control over the funds in the London bank accounts. *Id.* at 11a-14a. The court of

appeals explained that, although the United Kingdom did not have a "binding obligation" to turn over the funds to the United States, "the district court correctly determined that it had constructive control of the funds by virtue of the demonstrated cooperation of the British government." *Id.* at 13a. The court of appeals agreed with the district court that "the United Kingdom acted essentially as an agent of the United States for purposes of this forfeiture action" because "[e]very action of the British law enforcement officials has been in direct response to requests from federal authorities." *Ibid.* The court of appeals noted that, "in at least two other separate proceedings, the United Kingdom has returned funds to the United States after registering and enforcing decrees of forfeiture entered by a district court." *Ibid.* The court declined to "delineate the precise scope of what will constitute constructive control in future cases." *Id.* at 14a. Instead, it concluded that in this case "the government has met its burden of demonstrating that the British government will turn over at least a portion of the seized funds to the United States, thereby vesting the district court with the requisite constructive control over the funds." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-16) that the district court lacked *in rem* jurisdiction over the funds in the London bank accounts because it lacked constructive control of the *res*. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioner does not cite any other published decision by a federal court addressing

what constitutes constructive control of a *res* located in a foreign country under 28 U.S.C. 1355. Moreover, the court of appeals expressly refrained from making any broad pronouncements on that subject. Further review is therefore unwarranted.

This Court has long recognized that jurisdiction in civil forfeiture proceedings, as in all *in rem* actions, is based on the court's control of the *res*. See, *e.g.*, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-684 (1974); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719-720 (1971); *Pennington* v. *Fourth National Bank*, 243 U.S. 269 (1917). The Court has made clear that either actual or constructive control of the *res* suffices to confer jurisdiction. See *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 503 (1993) (citing *The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815)); *Republic National Bank* v. *United States*, 506 U.S. 80, 87 (1992). The Court has explained that the *res* "is actually within [the court's] possession, when it is submitted to the process of the court; it is constructively so, when, by a seizure, it is held, to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*." *The Brig Ann*, 13 U.S. (9 Cranch) at 291.

The court of appeals correctly held in this case that the district court had constructive control over the funds that the government sought to forfeit. Pet. App. 13a-14a. The British authorities, at the request of the United States, have seized the funds and are holding them for disposition in light of the outcome of this case. They obtained a restraining order from the Queen's Bench Division preventing transfer of the funds; they attached the funds by serving the

complaint and the arrest warrant *in rem* issued by the court in this case on the banks holding the funds; and the Crown Office Division upheld the restraining order "based on the civil proceedings in New York." *Id.* at 4c. The district court properly found that those circumstances provide "assurance that [the] judgment of forfeiture issued [in this case] would be enforced in England." *Id.* at 9c-10c.

Petitioner contends (Pet. 10, 15) that the court of appeals erred by relying on the government's representation on appeal that, in two prior cases, the United Kingdom has given funds in that country to the United States under forfeiture orders entered in this country. Petitioner argues (Pet. 15) that the government should have obtained "written assurance from the British government" that it would hand over the seized funds.

Petitioner's argument lacks merit. She cites no legal support for restricting the manner in which the government proves that a foreign nation intends to cooperate in a domestic forfeiture proceeding, and the argument cannot be squared with the Executive Branch's discretion in conducting foreign affairs. See *Sale* v. *Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2567 (1993) (citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)); cf. 46 U.S.C. App. 1903(c)(1) (in prosecution for maritime drug trafficking, government may prove foreign country's consent to United States' exercise of jurisdiction over vessel "by certification of the Secretary of State or the Secretary's designee"). Nor does petitioner suggest that the government's representation to the court of appeals was false or misleading; she does not assert, for example, that there were other cases in which the British government has declined

to hand over funds forfeited under an order entered in this country. Finally, even if the court of appeals erred by relying on the government's representation on appeal, the error was harmless, because the district court did not rely on any such representation in holding that it had constructive control over the *res*.

Petitioner also contends (Pet. 16) that the district court lacked *in rem* jurisdiction over any portion of the forfeited funds that the United Kingdom retains. That contention does not warrant further review. Petitioner does not challenge the court of appeals' determination that the amount of funds to be turned over "will depend on negotiations between the two nations." Pet. App. 13a. Thus, it is not clear what, if any, portion of the funds the British government will retain.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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